



November 8, 2010

The Honorable Lisa P. Jackson
Administrator
U. S. Environmental Protection Agency
Water Docket, Mailcode: 28221T
1200 Pennsylvania Ave., NW
Washington, DC 20460

Re: Chesapeake Bay TMDL -- Docket no. EPA-R03-OW-2010-0736

Dear Administrator Jackson:

On behalf of our more than 700,000 members, the Environmental Defense Fund (EDF) appreciates the opportunity to comment and respectfully submits the following in support of the Draft Chesapeake Bay Total Maximum Daily Load (TMDL).

Once called an “immense protein factory” by H.L. Menken, the Chesapeake Bay is a \$1 trillion national treasure upon which millions of people rely. Unfortunately, the Bay also is a resource in serious decline. Commercial oyster and blue crab catches from the Chesapeake have dropped precipitously. The Bay is plagued by algae blooms and, in some areas, low levels of dissolved oxygen that threaten aquatic life. Conditions are so dire that in 2009, EPA found that the Bay met only 24% of its water quality goals.

Part of the challenge in addressing the Bay’s water quality problems is the sheer size of this 64,000 square mile, multi-state watershed. The Bay’s watershed extends through the District of Columbia and parts of Maryland, Virginia, Pennsylvania, Delaware, West Virginia and New York (“the Bay States”). Taking a Bay-wide approach to the TMDL process is the only practical way to address sediment and nutrient pollution from such a wide array of sources spread over such a large and diverse watershed. Significant research, data collection, and monitoring have provided abundant information on the dynamics of pollutant transfer within the Bay watershed and made clear that a coordinated approach across the entire watershed is the only strategy that holds any real promise of success. Given the economic, social, cultural, and historic importance of the Bay, making restoration a reality is critical.

Congress has long been concerned by the decline of the Bay, directing EPA in 1976 to complete a comprehensive study, which led to establishment of the Chesapeake Bay

Program under the Chesapeake Bay Agreement of 1983.¹ In 1987, Congress amended the Clean Water Act² to include Section 117, continuing and expanding the Chesapeake Bay Program.

In 2003, EPA and its Bay Program partners developed ambient water quality criteria for the Bay and its tidal tributaries based on an extensive body of scientific data, research and analysis. The tidal water states (Delaware, Maryland and Virginia) and the District of Columbia revised their Chesapeake Bay tidal water quality standards in 2004-2005. EPA approved these water quality standards, and the states revised their 303(d) listings for Chesapeake Bay and tidal tributary waters to identify those failing to meet the new water quality standards. EPA also used the well-established Chesapeake Bay Model, and worked with a multi-state workgroup, to develop nutrient and sediment load allocations for all river basins and states in the Bay watershed³. All of the Bay States developed updated tributary-specific strategies to meet these allocations. For the past seven years, the states have known their load allocations and have developed strategies to attain them, consistent with the states' commitments under the *Chesapeake 2000* agreement and related MOUs to take voluntary and regulatory actions to meet water quality goals by 2010.

Unfortunately, the states and their partners have not met the 2010 restoration goals. EPA has worked cooperatively with the Bay States for decades in a transparent, public process to reduce nutrient and sediment pollution to the Bay. These efforts, while helpful, have not been sufficient to bring these waters into attainment with water quality standards, thus triggering the need, under the Clean Water Act, to develop a Bay-wide TMDL. None of the Bay States have developed TMDLs for their portion of the Bay watershed. Instead, they have invited EPA to take the lead in developing the Bay TMDL.⁴ EPA is not only well within its legal authority to promulgate the TMDL, as discussed below; EPA is obligated to do so.

Just as a state's submittal of an inadequate TMDL triggers EPA's obligation to "devise" a TMDL (Kingman Park Civic Ass'n v. EPA, 84 F.Supp. 2d 1, 2 (D.D.C. 1999), so too does failure to submit a TMDL to EPA at all. Courts have held that this failure constitutes "constructive submittal," because to rule otherwise would create an illogical result that Congress could not possibly have intended: to give unlimited license to states to sit on their hands and evade all responsibility for developing TMDLs while our waters continue to

¹ Maryland, Pennsylvania, Virginia, the District of Columbia, EPA and the Chair of the Chesapeake Bay Commission were signatories to the Agreement.

² The Clean Water Act of 1987 amending the Federal Water Pollution Control Act of 1972, 33 U.S.C. 1251 et seq.

³ The Chesapeake Bay Model, which is really a suite of computer models, is among the most sophisticated, studied and respected in the world. This set of models provides a comprehensive view of the Chesapeake ecosystem, stretching from the bottom of the Bay to the upper reaches of the watershed and including both land and air. The Model is a core element of the serious effort to use the best peer-reviewed science and water quality monitoring data to understand how the whole system is working now and what changes need to be made in order to achieve water quality goals.

⁴ EPA's role was decided at the October 1, 2007, Principals' Staff Committee.

deteriorate. See e.g., Kingman Park at 1-2; American Canoe Ass'n, Inc. v. U.S. EPA, 30 F. Supp. 2d 908, 919-22 (E.D. Va. 1998); Alaska Ctr. For the Env't v. Reilly, 762 F. Supp. 1422, 1426-29 (W.D. Wa. 1991).

Moreover, Section 117(g)(1) of the Clean Water Act unambiguously requires EPA to act:

The Administrator, in coordination with other members of the Chesapeake Executive Council, *shall* ensure that management plans are developed and implementation is begun by signatories to the Chesapeake Bay Agreement to achieve and maintain –

- (A) the nutrient goals of the Chesapeake Bay Agreement for the quantity of nitrogen and phosphorus entering the Chesapeake Bay and its watershed.
- (B) the water quality requirements necessary to restore living resources in the Chesapeake Bay ecosystem;....

33 U.S.C. Sec. 1267(g)(1)(A)-(g)(1)(B) (emphasis supplied).

The use of the word “shall” signals Congressional intent to impose a mandatory agency obligation. See e.g., Lexecon, Inc. v. Millberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 35 (1998).

Not only does EPA have authority and the responsibility to issue the Bay-wide TMDL, EPA has used its authority wisely by 1) engaging in a highly transparent, public process to develop the TMDL (including this opportunity submit public comments on the draft); and 2) providing states sufficient opportunity to prepare and revise draft Watershed Implementation Plans (WIPs) based upon their long-standing Tributary Strategies.

Finally, EPA included “backstop allocations” in the TMDL to assure that attainment will be achieved in the event that States fail to demonstrate reasonable assurance of timely achievement of their allocations through WIPs. Although not the preferred choice for States or EPA, the backstop allocations perform a necessary function of filling in where Bay States fail to promulgate adequate WIPs. We note that EPA continues to work with Bay States to revise their draft WIPs, providing additional opportunity for States to strike the balance themselves in determining load and waste load allocations for point sources and non-point sources.⁵

In closing, we also wish to emphasize the vital importance of economics, cooperation, partnership, and resources in achieving the clean water success we all seek. The ultimate goal of the TMDL – to restore water quality to the Chesapeake Bay – must go hand-in-hand with economic viability of the communities and sectors that call the Bay watershed home. EDF fully recognizes the need and authority of the TMDL to include backstop measures, but

⁵ We encourage EPA to continue working with New York. New York is, in some ways, uniquely situated with not only a smaller, but also declining, population base over which to spread compliance costs.

at the same time we strongly encourage EPA to continue to seek, support, and advance innovative, collaborative, and cost-effective practices and strategies that will foster both clean water and economic sustainability. We believe this can best be accomplished by working with states to devise adequate Watershed Implementation Plans that promote such practices and strategies, ensure all sectors shoulder their fair share of the reductions, and also provide reasonable assurances, thus avoiding the need for backstop measures.

We believe for the foregoing reasons that EPA's issuance of the TMDL is legal, appropriate, and much needed to restore the health of the magnificent Chesapeake Bay. In advancing the TMDL, EPA must continue to place equal priority on working with states to devise Watershed Implementation Plans. Thank you for considering our comments.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Suzy Friedman", with a long horizontal flourish extending to the right.

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